STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
AND THE OAKLAND COUNTY CIRCUIT COURT

STEVEN ILIADES and JANE ILIADES,

Plaintiffs-Appellees,

v.

DIEFFENBACHER NORTH AMERICA, INC,

Defendant-Appellant.

SCt No. 154358
COA No. 324726
LC No. 12-129407-NP

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT DIEFFENBACHER NORTH AMERICA, INC. IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

EXHIBITS

PROOF OF SERVICE

Submitted by:

Michelle A. Thomas (P35135)
THOMAS, DeGROOD & WITENOFF, P.C.
Of-Counsel for the Defendant-Appellant
400 Galleria Officentre, Suite 550
Southfield, MI 48034
(248) 353-4450
mthomas@thomasdegrood.com

Evan A. Burkholder (P67986)
Norma Gant (P45311)
LeCLAIR RYAN
Attorney for Defendant-Appellant
Fairlane Plaza North
290 Town Center Dr., Ste. 400
Dearborn, MI 48126
(313) 583-5953
Evan.Burkholder@leclairryan.com

Dated: December 6, 2016

TABLE OF CONTENTS

Index of Authorities ii

Factual Clarification 1

Reply Argument I 2

Plaintiffs' Untimely Brief in Opposition to the Application for Leave Should Be Struck for Failing to Comply with MCR 7.305(D)

Reply Argument II 2

Supreme Court Review is Warranted Over Unsettled Legal Issues of Statutory Construction Presented in This Product Misuse Case

Reply Argument III 3

The Factual Affirmative Defense of Comparative Negligence/Fault on the Part of a Product User Has No Impact upon the Construction and Application of the Statutory Absolute Legal Defense of Product Misuse

Conclusion 10

Exhibits:

Ex. 36 - 1995 PA 249
Ex. 37 - 1995 PA 161

INDEX OF AUTHORITIES

Cases	Pages
Barnebee v Spence Bros, 367 Mich 46; 116 NW2d 49 (1962)	7
Belleville v Rockford Mfg Croup, Inc, 172 F Supp 2d 913 (ED MI, 2001)	5
Bishop v Interlake, Inc, 121 Mich App 397; 328 NW2d 643 (1982)	4
Brisboy v Fibreboard Corp, 429 Mich 540; 418 NW2d 650 (1988)	7
Bullock v Gulf & W Mfg, 128 Mich App 316; 340 NW2d 294 (1983)	4
Byrnes v Economic Machinery Co, 41 Mich App 192; 200 NW2d 104 (1972)	4
Cacevic v Simplimatic Eng'g Co, 248 Mich App 670; 645 NW2d 287 (2001)	4
Citizens Ins Co of Am v Prof'l Temperature Heating & Air Conditioning, 2012 Mich App LEXIS 2140 (No 300524, 10/25/12)	3,5,6
Coger v Mackinaw Products Co, 48 Mich App 113; 210 NW2d 124 (1973)	4
Davis v Link, 195 Mich App 70 (1992)	6
Davis-Martinez v Brinks Guarding Servs, 2005 Mich App LEXIS 2824 (No 261941, 11/15/05)	3,5,6
Fjolla v Nacco Materials Handling Group, 2008 Mich App LEXIS 2432 (No 281493, 12/9/06)	3,5,6
Fredericks v GM Corp, 411 Mich App 712; 311 NW2d 725 (1981)	4
Gerling Konzera Allegemeine Vershicherung Ag v Lawson, 472 Mich 44; 693 NW2d 149 (2005)	9
Ghrist v Chrysler Corp, 451 Mich 242; 547 NW2d 272 (1996)	4
Gregory v Cincinnati, Inc, 202 Mich App 474; 509 NW2d 809 (1993)	4
Gronlie v Positive Safety Mfg Co, 50 Mich App 109; 212 NW2d 756 (1973)	4
Hardy v Monsanto Enviro-Chem Systems, Inc, 414 Mich 29; 323 NW2d 270 (1982)	4
Krol v Allied Prods Corp, 1996 Mich App LEXIS 1449 (No 175341, 8/16/96)	4
Laier v Kitchen, 266 Mich App 482; 702 NW2d 199 (2005)	4
Lowe v Estate Motors, Inc, 428 Mich 439; 410 NW2d 706 (1987)	8

Paul v Henri-Line Mach., Inc. 557, Fed. Appx. 535, 540-41 (6th Cir. 2014) 6

People v Feeley, 499 Mich 429, 343; 885 NW2d 223 (2016) 2

People v Harris, 499 Mich 332; 885 NW2d 832 (2016) 9,10

People v Tyrer, 385 Mich 484, 486; 189 NW2d 226 (1971) 2

Pippen v Denison, Div of Abex Corp, 66 Mich App 664; 239 NW2d 704 (1976) 4

Prentis v Yale Mfg, 421 Mich 670; 365 NW2d 176 (1984) 4

Pulver v Dundee Cement Co, 445 Mich 68; 515 NW2d 728 (1994) 8

Reeves v Cincinnati, Inc,176 Mich App 181; 439 NW2d 326 (1987) 4

Roberts v Mecosta Co Gen Hosp, 466 Mich 57; 642 NW2d 663 (2002) 9

Scott v Allen Bradley Co, 139 Mich App 665; 362 NW2d 734 (1984) 4

Shinholster v Annapolis Hosp, 471 Mich 540; 685 NW2d 275 (2004) 9

Shipman v Fontaine Truck Equip Co, 184 Mich App 706; 459 NW2d 30 (1990) 5

Timmerman v Universal Box Machine, 93 Mich App 680; 287 NW2d 316 (1979) 4

Tulkku v Mackworth Ress Div of Avis Indus, 406 Mich 615; 281 NW2d 291 (1976) 4

Tuttle v Yamaha Motor Corp, 2012 Mich App LEXIS 2085 (No 301776, 10/23/12) 6,7,8

Valex v Tuma, 492 Mich 1; 821 NW2d 432 (2012) 8

Villar v EW Bliss Co, 422 Mich 871; 365 NW2d 758 (1985) 4

Walton v Miller, 2011 Mich App LEXIS 1734 (No 293526, 10/4/11) 3,5,6

Court Rules

MCR 2.116(C)(10) 4
MCR 7.305 2
MCR 7.305(B)(1), (3), (5) 3
MCR 7.305(D) 2
MCR 7.305(F) 2

Statutes

MCL §600.2945	*8*
MCL §600.2945(c)	*2,3,4,6,8,9,10*
MCL §600.2947	*8*
MCL §600.2947(2)	*2,3,4,5,6,8,9,10*
MCL §600.2949	*8*
MCL §600.2957	*9*
MCL §§600.2956 to 2960	*9*
MCL §§600.2958 to 2960	*7*
MCL §600.6304	*9*

Miscellaneous

1978 PA 495	*8*
1995 PA 161	*9*
1995 PA 249	*4,5,8,9*

FACTUAL CLARIFICATION

Despite Plaintiffs' statements to the contrary, this case does not involve momentary inattention or inadvertent leaning in or merely reaching a hand or arm into the operating area of a large rubber molding press – conduct that the light curtain safety device at issue was designed to address. Rather, the undisputed evidence – including admissions by Plaintiff's' expert and by and on behalf of Steven Iliades – establishes that Iliades' injuries were caused by his deliberate and volitional decision to climb over a metal barrier and place much of his body into a huge press while it was running in automatic operating mode in complete disregard and violation of specific and repeated warnings and instructions provided by his sophisticated user employer [Iliades Dep, pp 54-56 (App Ex 1); Whiteside Dep, pp 7-9, 13-19 (App Ex 3); Mejia Dep, p 24 (App Ex 9); Richter Consultation Reports (App Ex 13); Green Dep, pp 14-17, 20-21, 26-28 (App Ex 11); Barnett Dep, pp 49-55 (App Ex 15); Barnett Report (App Ex 16); 9/17/14 Mt Trans, pp 12- 17].

Plaintiffs also inexcusably ignore undisputed evidence that the Defendant manufacturer had no actual knowledge or notice that press operators were climbing into the operating area and bypassing the light curtain of a press running in automatic mode and had no objectively discernible reason to anticipate such an objectively unreasonable misuse of the press [Brumaru Affidavit (App Ex 5); Michalak Dep pp 103-104 (App Ex 6); Barnett Dep, p 87 (App Ex 15); Def's Answer to Plaintiff's Interrogatory #15 (Application Ex 19); Def's Answers to Expert Witness Interrogatories #4 and 5 (App Ex 20); 9/17/14 Mt Trans, pp 14-17].

Moreover, Plaintiffs improperly cite as supporting evidence the 5/28/14 affidavit of proffered product expert Ralph Barnett (Plaintiffs' Ex O); on 7/23/14, the Circuit Court entered an Order *in Limine* striking the new/undisclosed opinions within the affidavit upon which Plaintiffs now rely (App Ex 18).

REPLY ARGUMENT I:

PLAINTIFFS' UNTIMELY BRIEF IN OPPOSITION TO THE APPLICATION FOR LEAVE SHOULD BE STRUCK FOR FAILING TO COMPLY WITH *MCR 7.305(D)*

MCR 7.305(F) permits this Court to strike a pleading that does not conform with the requirements of *MCR 7.305.* The Defendant-Appellant submitted its Application for Leave on August 30, 2016. Pursuant to *MCR 7.305(D),* a response on behalf of Plaintiffs-Appellees was due on or before September 27, 2016. Plaintiffs' response brief was not filed until November 15, 2016, forty-nine days **after** the filing deadline requirement set forth in *MCR 7.305(D).* As such, the response brief on behalf of the Plaintiffs-Appellees should be struck pursuant to *MCR 7.305(F)* for failing to comply with the requirements of *MCR 7.305(D)*.

REPLY ARGUMENT II:

SUPREME COURT REVIEW IS WARRANTED OVER UNSETTLED LEGAL ISSUES OF STATUTORY CONSTRUCTION PRESENTED IN THIS PRODUCT MISUSE CASE

Relying upon *People v Tyrer, 385 Mich 484, 486; 189 NW2d 226 (1971),* Plaintiffs argue that, in the interests of practical constraints upon the Supreme Court's plenary review capacity, the Court should "resist the temptation" to "become involved in the fascinating work" of the Circuit Court and Court of Appeals in this case. In *Tyrer,* the Court dismissed leave as improvidently granted having later determined that the issue presented: (1) was not one of law or one of first impression; and, (2) did not require the Court to resolve a conflict between the Court of Appeals' opinion and established precedent. *Id at 490-491.*

In sharp contrast with *Tyrer*, the issues presented here are questions of law focusing upon the proper judicial construction and application of statutory tort reform measures enacted in 1995 and found at *MCL §600.2947(2)* and *§600.2945(c).* See, i.e., *People v Feeley, 499 Mich 429, 343; 885 NW2d 223 (2016).* Additionally, as discussed in the Application for Leave, the majority panel's construction and application of the absolute product misuse defense created by the Michigan Legislature for manufacturers is totally inconsistent with prior Supreme Court precedent establishing general and controlling statutory construction and tort principles. Moreover, the majority opinion directly conflicts with previous Court of Appeals decisions

in *Citizens Ins Co of Am v Prof'l Temperature Heating & Air Conditioning, 2012 Mich App LEXIS 2140 (No 300524, 10/25/12,* App Ex 32*), Walton v Miller, 2011 Mich App LEXIS 1734 (No 293526, 10/4/11,* App Ex 33*), Fjolla v Nacco Materials Handling Group, 2008 Mich App LEXIS 2432 (No 281493, 12/9/06,* App Ex 34*),* and *Davis-Martinez v Brinks Guarding Servs, 2005 Mich App LEXIS 2824 (No 261941, 11/15/05,* App Ex 35*),* decisions which uniformly held that, as a matter of law, the civil liability of products manufacturers is completely negated if the evidentiary record establishes that the particular product use diverged from common practice, violated safety instructions and training provided to the user, and/or, was hazardous under any standard of reasonableness. Since both the prior and instant Court of Appeals decisions are unpublished, this case offers the Supreme Court the opportunity to provide needed definitive guidance regarding the proper judicial construction and application of *§§2947(2)* and *2945(c)*. That the legal issues presented are of major significance to the state's jurisprudence is further substantiated by the dissenting opinion below as well as the *amicus* brief submitted by the Michigan Defense Trial Counsel and accepted by the Court on November 2, 2016.

In short, the Defendant-Appellant has fully satisfied the requirements set forth in *MCR 7.305(B)(1), (3), (5)* and, as such, Supreme Court review is completely warranted.

REPLY ARGUMENT III:

THE FACTUAL AFFIRMATIVE DEFENSE OF COMPARATIVE NEGLIGENCE/FAULT ON THE PART OF A PRODUCT USER HAS NO IMPACT UPON THE CONSTRUCTION AND APPLICATION OF THE STATUTORY ABSOLUTE LEGAL DEFENSE OF PRODUCT MISUSE

Citing a multitude of state and federal cases, Plaintiffs argue that the Court of Appeals correctly reversed the grant of summary disposition on the statutory product misuse defense because the Circuit Court erroneously "obliterated" the line between comparative negligence and product misuse. Plaintiffs' apparent rationale: (1) a physically injured plaintiff's misuse of a product is essentially egregious comparative negligence/fault; (2) traditionally, comparative negligence, in general, and product misuse, in particular, have been questions for the trier of fact – and not for the trial courts; (3) not all comparative negligence rises to the

level of product misuse; and, (4) summary disposition pursuant to *MCR 2.116(C)(10)* is precluded where issues of fact exist regarding whether a plaintiff's comparative negligence/fault amounts to product misuse.

Plaintiffs' arguments are entirely without merit.

First, Plaintiffs provide introductory arguments which purportedly serves as an outline of Michigan law regarding the: (1) scope of product manufacturers' duties of care; (2) severity of injuries historically occurring in industrial settings deserving of substantial civil compensation; and, (3) availability and proper resolution of product misuse and comparative negligence defenses. Yet, most of the cases cited by Plaintiffs arose out of claims filed before March 28, 1996[1], and, therefore, before the effective date of the absolute misuse defense enacted via tort reform legislature set forth in *MCL §600.2947(2)* and *§600.2945(c),* as amended by *1995 PA 249*. Among these out-dated cases, several did not involve a product misuse defense[2]. Two of the pre-*1995 PA 249* cases cited by Plaintiffs, *Tulkku* and *Timmerman,* discuss the defense of contributory negligence in defective product actions and were subsequently overruled in *Hardy v Monsanto Enviro-Chem Systems, Inc, 414 Mich 29, 37; 323 NW2d 270 (1982).* See also: *Bishop v Interlake, Inc, 121 Mich App 397, 405; 328 NW2d 643 (1982).* One case involved a premises liability action alleging negligent repair[3].

Second, with respect to the proper construction and application of *1995 PA 249, §§2945(c)* and *2947(2),* Plaintiffs do not deign to discuss the recent and relevant cases of *Citizens Ins Co of Am, supra, Walton, supra, Fjolla, supra,* and/or, *Davis-Martinez, supra.* Instead, Plaintiffs rely exclusively upon *Belleville*

---

[1] *Ghrist v Chrysler Corp, 451 Mich 242; 547 NW2d 272 (1996); Prentis v Yale Mfg, 421 Mich 670; 365 NW2d 176 (1984); Reeves v Cincinnati, Inc,176 Mich App 181; 439 NW2d 326 (1987); Cacevic v Simplimatic Eng'g Co, 248 Mich App 670; 645 NW2d 287 (2001); Timmerman v Universal Box Machine, 93 Mich App 680; 287 NW2d 316 (1979); Byrnes v Economic Machinery Co, 41 Mich App 192; 200 NW2d 104 (1972); Coger v Mackinaw Products Co, 48 Mich App 113; 210 NW2d 124 (1973); Gregory v Cincinnati, Inc, 202 Mich App 474; 509 NW2d 809 (1993); Scott v Allen Bradley Co, 139 Mich App 665; 362 NW2d 734 (1984); Fredericks v GM Corp, 411 Mich App 712; 311 NW2d 725 (1981); Villar v EW Bliss Co, 422 Mich 871; 365 NW2d 758 (1985); Bullock v Gulf & W Mfg, 128 Mich App 316; 340 NW2d 294 (1983); Pippen v Denison, Div of Abex Corp, 66 Mich App 664; 239 NW2d 704 (1976); Tulkku v Mackworth Ress Div of Avis Indus, 406 Mich 615; 281 NW2d 291 (1976); Gronlie v Positive Safety Mfg Co, 50 Mich App 109; 212 NW2d 756 (1973); Krol v Allied Prods Corp, 1996 Mich App LEXIS 1449 (No 175341, 8/16/96).*

[2] *Reeves, supra; Cacevic, supra; Timmerman, supra; Scott, supra; Fredericks, supra; Villar, supra; Bullock, supra; Pippen, supra; Tulkku, supra; Gronlie, supra; Krol, supra.*

[3] *Laier v Kitchen, 266 Mich App 482; 702 NW2d 199 (2005).*

v Rockford Mfg Croup, Inc, 172 F Supp 2d 913 (ED MI, 2001). The issue before the *Belleville* Court was whether product misuse, in the form of the failure of an operator of an industrial machine to utilize the recommended set up procedures was reasonably foreseeable to the manufacturer. *Id, 172 F Supp 2d at 918.* The federal district court initially, and correctly, recognized that, pursuant to *MCL §600.2947(2), 1995 PA 249,* the issue of reasonable foreseeability is one of law for the court. *Id.* Relying upon the pre-1995 PA 249 decision of *Shipman v Fontaine Truck Equip Co, 184 Mich App 706, 708; 459 NW2d 30 (1990),* the *Belleville* Court ultimately concluded that, as a matter of law, the product misuse was reasonably foreseeable from the standpoint of the manufacturer given evidence that: (1) the set up method used by the fatally injured user had been a long and widely utilized industry practice; (2) the manufacturer was aware of the risk of injuries associated with the set up process; (3) the manufacturer had previously designed a safety device specifically intended to prevent the type of injury suffered by the decedent machine operator; and, (4) the manufacturer had installed the device on all machines utilized in Europe but had not offered the safety device to decedent's Michigan-based employer. *Id, 172 F Supp 2d at 91-918.*

The factual distinctions between the instant case and *Belleville* truly serve to validate the Circuit Court's decision to grant summary disposition to Defendant Dieffenbacher because it is undisputed here that: (1) Dieffenbacher installed a light curtain on the presses utilized by Iliades' employer in order to protect operators from injuries associated with improper contact with the press operating area; (2) the light curtain on the press being operated by Iliades at the time of his injury was functioning as intended; (3) Iliades' decision to climb into a press running in automatic mode was absolutely contrary to the Dieffenbacher's instructions and warnings as well as the instructions and training provided by Iliades' sophisticated user employer; (4) Iliades' conduct is not a common industry practice; and, (5) Dieffenbacher did not know and could not have reasonably anticipated that a press operator would deliberately engage in such dangerous

conduct.[4] Specifically as to the requisite demonstration of reasonable foreseeability through knowledge or notice on the part of Dieffenbacher, Plaintiffs did **not** rebut, or even challenge, the consistent – **and legally dispositive** – testimony of Iliades' employer and Defendant's electrical engineer that, in the course of millions of machine cycles over a 15 year period, there was **not a single report** of an injury caused by an operator climbing part way into an operating molding machine and bypassing the light curtain. See: *Citizens Ins Co of Am, supra; Walton, supra; Fjolla, supra;* and/or, *Davis-Martinez, supra.* See also: *Davis v Link, 195 Mich App 70, 72 (1992)* (Plaintiff failed to rebut evidence that product had been successfully used for many years without incident); *Paul v Henri-Line Mach., Inc. 557, Fed. Appx. 535, 540-41 (6th Cir. 2014)* (absence of incident reports documenting the same, or substantially similar, product injuries).

The bottom line is that Plaintiffs failed to produce any evidence establishing that the Iliades' particular misuse of the press was reasonably foreseeable from the standpoint of the Defendant Dieffenbacher so as to preclude this Defendant's entitlement to summary disposition, as a matter of law, pursuant to absolute defense found in *MCL §§600.2945(c) and 2947(2).*

Third, Plaintiffs fail to cite any controlling legal authority justifying the decision by the Court of Appeals majority panel to graft a common law comparative negligence "sliding scale" upon the statutory product misuse defense. Rather, Plaintiffs rely exclusively upon the unpublished decision in *Tuttle v Yamaha Motor Corp, 2012 Mich App LEXIS 2085 (No 301776, 10/23/12)* to support arguments that product misuse should be treated as a matter of comparative negligence/fault with a plaintiff's *pro rata* share of fault serving to reduce a monetary award against a manufacturer as opposed to completely barring all recovery. Plaintiffs' reliance upon *Tuttle* is entirely misplaced.

[4] Iliades Dep, pp 54-56 (App Ex 1); Whiteside Dep, pp 7-9, 13-19 (App Ex 3); Mejia Dep, p 24 (App Ex 9); Richter Consultation Reports (App Ex 13); Green Dep, pp 14-17, 20-21, 26-28 (App Ex 11); Barnett Dep, pp 49-55, 87 (App Ex 15); Barnett Report (App Ex 16); 9/17/14 Mt Trans, pp 12-17; Brumaru Affidavit (App Ex 5); Michalak Dep pp 93-94,103-104 (App Ex 6); Def's Answer to Plaintiff's Interrogatory #15 (Application Ex 19); Def's Answers to Expert Witness Interrogatories #4 and 5 (App Ex 20); Brumaru Dep, p 44(App Ex 7); App Ex 24.

The *Tuttle* plaintiff sustained a fracture when his left leg protruded as an ATV designed and manufactured by the defendant tipped over during a sharp turn. *Id at *1.* Plaintiff's civil claims asserted: theories of: unstable design; lack of door guards to prevent injury to protruding limbs; and, inadequate warnings and instructions. *Id at *3.* The manufacturer sought summary relief, arguing that: (1) given plaintiff's admission that he may have intentionally extended his leg to brace against vehicle tipping, plaintiff could not produce the requisite non-speculative evidence of causation; and, (2) the plaintiff's misuse of the vehicle precluded the imposition of liability. *Id at *3-4.* The Circuit Court granted summary disposition on the causation argument, only. *Id at *4-5.* The Court of Appeals reversed, reasoning that genuine issues of material fact existed regarding whether: (1) the manufacturer's negligence was a substantial factor in the harm suffered; and, (2) plaintiff's actions constituted an intervening and superseding cause. *Id at *13.*

Interestingly, the *Tuttle* Court was tempted to rule that, as a matter of law, the plaintiff's conduct could not be an intervening superseding cause in light of evidence that, prior to the plaintiff's accident, the manufacturer: (1) was fully aware of the risk of injury – including broken legs – associated with users' instinctive or intentional attempts to support/protect themselves during rollovers and tipovers; and (2) had discontinued the installation of safety bars intended to protect operators' limbs. *Id at *2, 14, n 4.* However the Court correctly determined that the jury must decide all disputed causation issues. *Id at 14, n 4, citing Barnebee v Spence Bros, 367 Mich 46, 51; 116 NW2d 49 (1962). See also, Brisboy v Fibreboard Corp, 429 Mich 540, 551-552; 418 NW2d 650 (1988).* By way of *dicta*, the Court then suggested that the impact of evidence of negligence on the part of a product user should be viewed as a matter of comparative negligence rather than an absolute defense to liability, citing the comparative fault scheme set forth in *MCL §§600.2958 to 2960. Id at *15.*

Critically, the *Tuttle* Court refused to address product misuse arguments asserted by the defendant as an alternate basis for affirming summary disposition, noting that the Circuit Court had not ruled on this

separate defense. *Id at *15-16.* However, the Court of Appeals noted that the defendant was free on remand to pursue that defense. *Id.*

Ironically, *Tuttle* actually supports the conclusion that comparative negligence/fault and product misuse are separate defenses with distinct and independent applications and affects upon recovery.

Indeed, the unambiguous language and the legislative history of *1995 PA 249* confirm that the existence and extent of the comparative negligence/fault on the part of a product user plays absolutely no role in the enforcement of the absolute product misuse defense conferred upon product manufacturers by the Michigan Legislature.

Prior to the enactment of *1995 PA 249,* including *§§600.2945(c)* and *2947(2),* the doctrines of comparative negligence and product misuse had been recognized in case and statutory law as affirmative defenses to product claims to be resolved by the trier of fact. See, i.e., *Lowe v Estate Motors, Inc, 428 Mich 439, 455; 410 NW2d 706 (1987); 1978 PA 495, §§2947, 2949*. It must be presumed that the Legislature was aware of this existing law when enacting *1995 PA 249*. *Valex v Tuma, 492 Mich 1, 11; 821 NW2d 432 (2012); Pulver v Dundee Cement Co, 445 Mich 68, 75; 515 NW2d 728 (1994).*

Significantly, *1995 PA 249* (**Ex 36**) embraced a series of tort reforms affecting both comparative negligence and produce misuse defenses. Again, via amendments to *§§600.2945* and *2947,* the Legislature reformed product misuse from a factual affirmative defense to be decided by the jury, into an **absolute legal defense** to be decided by the courts. Specifically, the plain language of *§§2945(c)* and *2947(2)* operates to completely shield a product manufacturer from civil liability where the reviewing court determines, as a matter of law, that the product was used "in a materially different manner than the product's intended use", including, as in this case, uses "contrary to a warning or instruction provided by the manufacturer…or another person possessing knowledge or training the use … of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances." The

only exception allowed by the Legislature: where a court determines, as a matter of law, that the particular misuse at issue was "reasonably foreseeable".

Also via *1995 PA 249,* albeit in *§§2957* and *6304,* the Legislature adopted a system of comparative fault. Other portions of the comparative fault system were enacted in *1995 PA 161* (**Ex 37**), effective 9/1/95; specifically, the Legislature further amended *§6304* and added *§§2956-2960.* In essence, the statutory comparative fault system abolishes joint and several liability in most tort actions in favor of allocation of fault by the trier of fact among all persons – including party plaintiff(s) – who contributed to or were involved in an actionable death or injury. See, i.e., *Gerling Konzera Allegemeine Vershicherung Ag v Lawson*, *472 Mich 44, 51; 693 NW2d 149 (2005); Shinholster v Annapolis Hosp, 471 Mich 540, 552; 685 NW2d 275 (2004).*

The salient point: the Legislature elected to allow comparative negligence/fault defenses to remain questions of fact while removing from the jury any consideration of product misuse. This deliberate action obviously manifests a policy determination on the part of the Michigan Legislature that the comparative fault system have no bearing upon a court's resolution of the availability of the absolute product misuse defense -- an expression of legislative intent that must be honored by the Michigan Courts. *People v Harris, 499 Mich 332, 335; 885 NW2d 832 (2016).*

Moreover and markedly, *1995 PA 249, §§600.2945(c)* and *2947(2)* do not explicitly mention or refer to the comparative negligence or fault of the product user, in generic terms, or by reference or incorporation of any sections of the comparative fault statutes enacted via *1995 PA 249* and/or *1995 PA 161.* Had the Michigan Legislature intended for the new statutory comparative fault scheme to play a role in the application of the new absolute product misuse defense, this intention should have been made **plain**. *Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 63; 642 NW2d 663 (2002).* Such an intention could have been readily achieved by the Michigan Legislature when drafting *1995 PA 249* since this act addressed both comparative negligence/fault and product misuse defense.

As it is, the unambiguous language utilized in *MCL §§600.2945(c)* and *2947(2)*, language which clearly and severely restricts the ability of a product misuser from recovery civil damages from the manufacturer, must now be enforced, as written. *Harris, supra.*

In sum, this Court should reject the ill-advised and unfounded attempts by Plaintiffs, as erroneously sanctioned by the Court of Appeals majority, to second guess the wisdom of the relief from civil liability conferred upon manufacturers of misused products by the Michigan Legislature in *MCL §§600.2945(c)* and *2947(2)*. In particular, this Court should reverse the opinion of the Court of Appeals majority which improperly creates a common law exception to the statutory defense by making resolution of product misuse a matter of comparative negligence/fault for the trier of fact rather than the absolute legal defense intended by the Legislature.

CONCLUSION

For the reasons stated in this Reply Brief, as well as in its Application for Leave, the Defendant Dieffenbacher North America, Inc., respectfully requests the Supreme Court to grant its Application for Leave and reverse and vacate the Court of Appeals' majority opinion dated July 19, 2016. This relief can be awarded peremptorily or following further argument and/or briefing on the merits.

/s/ Michelle A. Thomas
THOMAS, DEGROOD & WITENOFF, P.C.
Of-Counsel for Defendant-Appellant
400 Galleria Officentre, Suite 550
Southfield, MI 48034
(248) 353-4450
mthomas@thomasdegrood.com
P35135

/s/ Evan a. Burkholder
LeCLAIR RYAN
Attorney for Defendant-Appellant
Fairland Plaza North
Dearborn, MI 48126
(313) 583-5953
Evan.Burkholder@leclairryan.com
P67986

EXHIBIT 36

1995 Mi. SB 344

Enacted, December 25, 1995

Reporter
1995 Mi. ALS 249; 1995 Mi. P.A. 249; 1995 Mi. SB 344

MICHIGAN ADVANCE LEGISLATIVE SERVICE > MICHIGAN 88TH LEGISLATURE -- 1995 REGULAR SESSION > (Act 249, Public Acts of 1995) > SENATE BILL 344

Notice

[D> Text within these symbols is deleted **<D]**

Synopsis

AN ACT to amend sections 1629, 1641, 2945, 2946, 2947, 2948, 2957, and 6304 of Act No. 236 of the Public Acts of 1961, entitled as amended "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil and criminal actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act," sections 1629, 1641, 2945, 2948, and 6304 as amended and section 2957 as added by *Act No. 161 of the Public Acts of 1995*, being *sections 600.1629*, *600.1641*, *600.2945*, *600.2946*, *600.2947*, *600.2948*, *600.2957*, and ***600.6304** of the Michigan Compiled Laws*; to add sections 2946i, 2949a, 2955, 2955a, 2962, and 6312; and to repeal acts and parts of acts.

Text

The People of the State of Michigan enact:

Section 1. Sections 1629, 1641, 2945, 2946, 2947, 2948, 2957, and 6304 of Act No. 236 of the Public Acts of 1961, sections 1629, 1641, 2945, 2948, and 6304 as amended and section 2957 as added by *Act No. 161 of the Public Acts of 1995*, being *sections 600.1629*, *600.1641*, *600.2945*, *600.2946*, *600.2947*, *600.2948*, *600.2957*, and 600.6394 of the Michigan Compiled Laws, are amended and sections 2946a, 2949a, 2955, 2955a, 2962, and 6312 are added to read as follows:

Sec. 1629. (1) Subject to subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:

(a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:

(i) The defendant resides, has a place of business, or conducts business in that county.

(ii) The corporate registered office of a defendant is located in that county.

(b) If a county does not satisfy the criteria under subdivision (a), the county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:

(i) The plaintiff resides, has a place of business, or conducts business in that county.

(ii) The corporate registered office of a plaintiff is located in that county.

(c) If a county does not satisfy the criteria under subdivision (a) or (b), a county in which both of the following apply is a county in which to file and try the action:

(i) The plaintiff resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.

(ii) The defendant resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.

(d) If a county does not satisfy the criteria under subdivision (a), (b), (c), a county that satisfies the criteria under section 1621 or 1627 is a county in which to file and try an action.

(2) Any party may file a motion to change venue based on hardship or inconvenience.

(3) For the purpose of this section only, in a product liability action, a defendant is considered to conduct business in a county in which the defendant's product on sold at retail.

Sec. 1641. (1) Except as provided in subsection (2), if causes of action are joined, whether properly or not, venue is proper in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change as provided by court rule.

(2) If more than 1 cause of action is pleaded in the complaint or added by amendment at any time during the action and 1 of the causes of action is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, venue shall be determined under the rules applicable to actions in tort as provided in section 1629.

Sec. 2945. As used in this section and sections 1629, 2945 to 2949a, and 5805:

(a) "Alteration" means a material change in a product after the product leaves the control of the manufacturer or seller. Alteration includes a change in the product's design, packaging, or labeling; a change to or removal of a safety feature, warning, or instruction; deterioration or damage caused by failure to observe routine care and maintenance or failure to observe an installation, preparation, or storage procedure; or a change resulting from repair, renovation, reconditioning, recycling, or reclamation of the product.

(b) "Drug" means that term as defined in section 201 of the federal food, drug, and cosmetic act, chapter 675, 52 . 1040, *21 U.S.C. 321.* However, drug does not include a medical appliance or device.

(c) "Economic loss" means objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses.

(d) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.

(e) "Misuse" means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training

regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

(f) "Noneconomic loss" means any type of pain, suffering, inconvenience, physical impairment, , mental anguish, emotional distress, loss of society and companionship, loss of consortium injury to reputation, humiliation, or other nonpecuniary damages.

(g) "Product" includes any and all component parts to a product.

(h) "Product liability action" means an action based on a legal or equitable, theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product.

(i) "Production" means manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling.

(j) "Sophisticated user" means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user.

Sec. 2946. (1) It shall be admissible as evidence in a product liability action that the production of the product was in accordance with the generally recognized and prevailing nongovernmental standards in existence at the time the specific unit of the product was sold or delivered by the defendant to the initial purchaser or user.

(2) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a production defect, the manufacturer or seller is not liable unless the plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available that would have prevented the harm greater risk of harm to others. An alternative production practice is practical and feasible only if the technical, medical, or scientific knowledge relating to production of the product, at the time the specific unit of the product left the control of the manufacturer or seller, was developed, available and capable of use in the production of the product and was economically feasible for use by the manufacturer. Technical, medical, or scientific knowledge is not economically feasible for use by the manufacturer if use of that knowledge in production of the product would significantly compromise the product's usefulness or desirability.

(3) With regard to the production of a product that is the subject of a product liability action, evidence of a philosophy, theory, knowledge, technique, or procedure that is learned, placed in use, or discontinued after the event resulting in the death of the person or injury to the person or property, which if learned, placed in use, or discontinued before the event would have made the event less likely to occur, is admissible only for the purpose of providing the feasibility of precautions, if controverted, or for impeachment.

(4) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, there is a rebuttable presumption that the manufacturer or seller is not liable if; at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm was in compliance with standards relevant to the event causing the death or injury set forth in a federal or state statute or was approved by, or was in compliance with regulations or standards relevant to the event causing the death or injury promulgated by, a federal or state agency responsible for reviewing the safety of the product. Noncompliance with a standard relevant to the event causing the death or injury set forth in a federal or state statute or lack of approval by, or noncompliance with regulations or standards relevant to the event causing the death or injury promulgated by, a federal or state agency does not raise a presumption of negligence on the part of a manufacturer or seller. Evidence of compliance or noncompliance with a regulation or standard not relevant to the event causing the death or injury is not admissible.

(5) In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller. However, this subsection does not apply to a drug that is sold in the United States after the effective date of an order of the United States food and drug administration to remove the drug from the market or to withdraw its approval. This subsection does not apply if the defendant at any time before the event that allegedly caused the injury does any of the following:

(a) Intentionally withholds from or misrepresents to the United States food and drug administration information concerning the drug that is required to be submitted under the federal food, drug, and cosmetic act, chapter 675, *52 Stat. 1040,* *21 U.S.C. 301* to 321, 331 to 343-2, 344 to 346a, 347, 348 to 353, 355 to 360, 360b to 376, and 378 to 395, and the drug would not have been approved, or the United States food and drug administration would have withdrawn approval for the drug if the information were accurately submitted.

(b) Makes an illegal payment to an official or employee of the United States food and drug administration for the purpose of securing or maintaining approval of the drug.

Sec. 2946a. (1) In an action for product liability, the total amount of damages for noneconomic loss shall not exceed $ 280,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed $ 500,000.00. On the effective date of the amendatory act that added this section, the state treasurer shall adjust the limitations set forth in this subsection so that the limitations are equal to the limitations provided in section 1483. After that date, the state treasurer shall adjust the limitations set forth in this subsection at the end of each calendar year so that they continue to be equal to the limitations provided in section 1483.

(2) In awarding damages in a product liability action, the trier of fact shall itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party shall inform the jury of the limitations under subsection (1). The court shall adjust an award of noneconomic loss to conform to the limitations under subsection (1).

(3) The limitation on damages under subsection (1) for death or permanent loss of a vital bodily function does not apply to a defendant if the trier of fact determines by a preponderance of the evidence that the death or loss was the result of the defendant's gross negligence, or if the court finds that the matters stated in section 2949a are true.

(4) If damages for economic loss cannot readily be ascertained by the trier of fact, then the trier fact shall calculate damages for economic loss based on an amount that is equal to the state average median family income as reported in the immediately preceding federal decennial census and adjusted by the state treasurer in the same manner as provided in subsection (1).

Sec. 2947. (1) A manufacturer or seller is not liable in a product liability action for harm caused by an alteration of the product unless the alteration was reasonably foreseeable. Whether there was an alteration of a product and whether an alteration was reasonably foreseeable are legal issues to be resolved by the court.

(2) A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.

(3) A manufacturer or seller is not liable in a product liability action if the purchaser or user of the product was aware that use of the product created an unreasonable risk of personal injury and voluntarily exposed himself or herself to that risk and the risk that he or she exposed himself or herself to was the proximate cause of the injury. This subsection does not relieve a manufacturer or seller from a duty to use reasonable care in a product's production.

(4) Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user.

(5) A manufacturer or seller is not liable in a product liability action if the alleged harm was caused by an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability, and that is recognized by a person with the ordinary knowledge common to the community.

(6) In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:

(a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.

(b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

Sec. 2948. (1) Evidence is admissible in a product liability action that, before the death of the person or injury to the person or damage to property, pamphlets, booklets, labels, or other written warnings were provided that gave notice to foreseeable users of the material risk of injury, death, or damage connected with the foreseeable use of the product or provided instructions as to the foreseeable uses, applications, or limitations of the product that the defendant knew or should have known.

(2) A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

(3) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a failure to provide adequate warnings or instructions, a manufacturer or seller is not liable unless the plaintiff proves that the manufacturer knew or should have known about the risk of harm based on the scientific, technical, or medical information reasonably available at the time the specific unit of the product left the control of the manufacturer.

(4) This section does not limit a manufacturer's or seller's duty to use reasonable care in relation to a product after the product has left the manufacturer's or seller's control.

Sec. 2949a. In a product liability action, if the court determines that at the time of manufacture or distribution the defendant had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that is the basis of the action, and the defendant willfully disregarded that knowledge in the manufacture or distribution of the product, then sections 2946(4), 2946a, 2947(1) to (4), and 2948(2) do not apply.

Sec. 2955. (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:

(a) Whether the opinion and its basis have been subjected to scientific testing and replication.

(b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology, is relied upon by experts outside of the context of litigation.

(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

Sec. 2955a. (1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

(2) As used in this section:

(a) "Controlled substance" means that term as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being *section 333.7104 of the Michigan Compiled Laws*.

(b) "Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance. An individual is presumed under this section to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance **[D>** if, **<D]** under a standard prescribed by section 625a of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being *section 257.625a of the Michigan Compiled Laws*, a presumption would arise that the individual's ability to operate a vehicle was impaired.

Sec. 2957. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

(2) Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

(3) Sections 2956 to 2960 do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

Sec. 2962. This section applies to an action for professional malpractice against a certified public accountant. A certified public accountant is liable for civil damages in connection with public accounting services performed by the certified public accountant only in 1 of the following situations:

(a) A negligent act, omission, decision, or other conduct of the certified public accountant if the claimant is the certified public accountant's client.

(b) An act, omission, decision, or conduct of the certified public accountant that constitutes fraud or an intentional misrepresentation.

(c) A negligent act, omission, decision, or other conduct of the certified public accountant if the certified public accountant was informed in writing by the client at the time of engagement that a primary intent of the client was for the professional public accounting services to benefit or influence the person bringing the action for civil damages. For the purposes of this subdivision, the certified public accountant shall identify in writing to the client each person, generic group, or class description that the certified public accountant intends to have rely on the services. The certified public accountant may be held liable only to each identified person, generic group, or class description. The certified public accountant's written identification shall include each person, generic group, or class description identified by the client as being benefited or influenced.

Sec. 6304. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under under section 2925d, regardless of whether the person was or could not have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312.

(5) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1453 or any other provision of section 1483.

(6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(l), 1 of the following applies:

(a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in section 5535a(1).

(b) If the plaintiff is determined to have fault under subsections (1) and (2), upon motion made not later than 6 months after a final judgment is entered, the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, whether or not another party is a person or entity described in section 5535a(1), according to their respective percentages of fault as determined under subsection (1). A party is not required to pay a percentage of any

uncollectible amount that exceeds that party's percentage of fault as determined under subsection (1). The party whose liability is reallocated continues to be subject to contribution and to any continuing liability to the plaintiff on the judgment.

(7) Notwithstanding subsection (6), a governmental agency, other than a governmental hospital or medical care facility, is not required to pay a percentage of any uncollectible amount that exceeds the governmental agency's percentage of fault as determined under subsection (1).

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

Sec. 6312. A defendant that is found liable for an act or omission that causes personal injury, property damage, or wrongful death is jointly and severally liable if the defendant's act or omission is any of the following:

(a) A crime, an element of which is gross negligence, for which the defendant is convicted.

(b) A crime involving the use of alcohol or a controlled substance for which the defendant is convicted and that is a violation of 1 or more of the following:

(i) Section 14 of the explosives act of 1970, Act No.202 of the Public Acts of 1970, being section 29.54 of the Michigan Compiled laws.

(ii) Section 111 of the Michigan code of military justice of 1980, Act No. 523 of the Public Acts of 1980, being *section 32.1111 of the Michigan Compiled Laws*.

(iii) Section 625 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625 of the Michigan Compiled laws.

(iv) Section 185 of the aeronautics code of the state of Michigan, Act No. 327 of the Public Acts of 1945, being *section 259.185 of the Michigan Compiled Laws*.

(v) Section 80176 of part 801 (marine safety), 81134 of part 811 (off-road recreation vehicles), or 82127 of part 821 (snowmobiles) of the natural resources and environmental protection act, *Act No. 451 of the Public Acts of 1994*, being *sections 324.80176*, *324.81134*, and *324.82127 of the Michigan Compiled Laws*.

(vi) Section 353 of the railroad code of 1993, *Act No. 354 of the Public Acts of 1993*, being *section 462.353 of the Michigan Compiled Laws*.

Section 2. Section 2949 of Act No. 236 of the Public Acts of 1961, being *section 600.2949 of the Michigan Compiled Laws*, is repealed.

Section 3. Sections 1629, 1641, 2945, 2946, 2947, 2948, 2957, and 6304 of Act No. 236 of the Public Acts of 1961, being *sections 600.1629*, *600.1641*, *600.2945*, *600.2946*, *600.2947*, *600.2948*, *600.2957*, and ***600.6304** of the Michigan Compiled Laws*, as amended by this amendatory act, and sections 2946a, 2949a, 2955, 2955a, 2962, and 6312 of Act No. 236 of the Public Acts of 1961, being *sections 600.2946a*, *600.2949a*, *600.2955a*, *600.2962*, and *600.6312 of the Michigan Compiled Laws*, as added by this amendatory act, apply to actions filed on or after the effective date of this amendatory act.

History

Approved by the Governor on December 25, 1995

Sponsor

Gougeon

End of Document

EXHIBIT 37

User Name: MICHELLE THOMAS
Date and Time: Nov 29, 2016 10:12
Job Number: 40212611

Document (1)

1. *1995 Mi. HB 4508*
   Client/Matter: DIE-ILI
   Search Terms: "600.2956"
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Statutes and Legislation	All Jurisdictions: Michigan

1995 Mi. HB 4508

Enacted, September 29, 1995

Reporter
1995 Mi. ALS 161; 1995 Mi. P.A. 161; 1995 Mi. HB 4508

MICHIGAN ADVANCE LEGISLATIVE SERVICE > MICHIGAN 88TH LEGISLATURE -- 1995 REGULAR SESSION > (Act 161, Public Acts of 1995) > HOUSE BILL 4508

Synopsis

AN ACT to amend sections 1621, 1627, 1629, 1641, 2925d, 2945, 2948, 6304, and 6306 of Act No. 236 of the Public Acts of 1961, entitled as amended "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil and criminal actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act," sections 1621 and 1627 as amended and sections 1629 and 6806 as added by Act No. 178 of the Public Acts of 1986 and section 6304 as amended by *Act No. 78 of the Public Acts of 1993*, being *sections 600.1621*, *600.1627*, *600.1629*, *600.1641*, *600.2925d*, *600.2945*, *600.2948*, *600.6304*, and *600.6306 of the Michigan Compiled Laws*; to add sections 2956, 2957, 2958, 2959, and 2960; and to repeal acts and parts of acts.

Text

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 1621, 1627, 1629, 1641, 2925d, 2945, 2948, 6804, and 6306 of Act No. 286 of the Public Acts of 1961, sections 1621 and 1627 as amended and sections 1629 and 6306 as added by Act No. 178 of the Public Acts of 1986 and section 6304 as amended by *Act No. 78 of the Public Acts of 1993*, being *sections 600.1621*, *600.1627*, *600.1629*, *600.1641*, *600.2925d*, *600.2945*, *600.2948*, *600.6304*, and *600.6306 of the Michigan Compile Laws*, are amended and sections 2956, 2957, 2958, 2959, and 2960 are added to read as follows:

Sec. 1621. Except for actions provided for in sections 1605, 1611, 1615, and 1629, venue is determined as follows:

(a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.

(b) If none of the defendants meet 1 or more of the criteria in subdivision (a), the county in which a plaintiff resides or has a place of business, or in which the registered office of a plaintiff corporation is located, is a proper county in which to commence and try and action.

(c) An action against a fiduciary appointed by court order shall be commenced in the county in which the fiduciary was appointed.

Sec. 1627. Except for actions founded on contract and actions provided for in sections 1605, 1611, 1615, and 1629, the county in which all or a part of the cause of action arose is a proper county in which to commence and try the

action. Suits against the surety of a public officer or his or her appointees are not excepted from the application of this section.

Sec. 1629. (1) Subject subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:

(a) The county in which the original injury occurred and in which either of the following applies is a proper county in which to commence and try the action:

(i) The defendant resides, has a place of business, or conducts business in the county.

(ii) The registered office of a defendant corporation is located in that county.

(b) If no county satisfies the criteria under subdivision (a), the county in which the original injury occurred and in which either of the following applies is a proper county in which to commence and try the action:

(i) The plaintiff resides, has a place of business, or conducts business in that county.

(ii) The registered office of a plaintiff corporation is located in that county.

(c) If no county satisfies the criteria under subdivision (a) or (b), a county in which both of the following apply is a proper county in which to commence and try the action:

(i) The plaintiff resides, has a place of business, or conducts business in that county, or the registered office of a plaintiff corporations is located in that county.

(ii) The defendant resides, has a place of business, or conducts business in that county, or the registered office of a defendant corporation is located in that county.

(d) If no county satisfies the criteria under subdivision (a), (b), or (c), a county that satisfies the criteria under section 1621 or 1627 is a proper county in which to commence and try an action.

(2) Either party may file a motion for a change in venue based on hardship or inconvenience.

(3) For the purpose of this section, in a product liability action, a defendant is considered to conduct business in a county in which the defendant's product is sold at retail.

Sec. 1641. (1) Except as provided in subsection (2), if causes of action are joined, whether properly or not, the venue may be laid in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change as provided by court rule.

(2) If more than 1 cause of action is pleaded in the initial complaint or added by amendment at any time during the action and 1 of the causes of action is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, venue shall be determined under section 1629.

Sec. 2925d. If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 or 2 or more persons for the same injury or the same wrongful death, both of the following apply:

(a) The release or covenant does not discharge 1 or more of the other persons from liability for the injury or wrongful death unless its terms so provide.

(b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.

Sec. 2945. As used in sections 2946 to 2948 and section 5805, "product liability action" means an action based on a legal or equitable theory of liability brought for or on account of death or injury to person or damage to property caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation,

processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product.

Sec. 2948. Evidence is admissible in a product liability action that, before the event of death or injury to person or damage to property, pamphlets, booklets, labels, or other written warnings were provided that gave notice to foreseeable users of the material risk of injury, death, or damage connected with the foreseeable use of the product or provided instructions as to the foreseeable uses, applications, or limitations of the product that the defendant knew or should have known.

Sec. 2956. Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

Sec. 2957. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault.

(2) Except as otherwise provided in this subsection, in assessing percentages of fault as provided in subsection (1), the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action. However, the trier of fact shall not assess fault to a nonparty unless a party gives notice within 182 days after the filing of the defendant's answer that the nonparty is wholly or partially at fault. The notice shall designate the nonparty and set forth the nonparty's name and last known address, or the best identification of the nonparty that is possible, together with a brief statement of the basis for believing the nonparty is at fault.

(3) Upon motion of a party within 91 days after the filing and service of the notice identifying a nonparty under subsection (2), the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

(4) Sections 2956 to 1960 do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

Sec. 2958. Subject to section 2959, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a plaintiff's contributory fault does not bar that plaintiff's recovery of damages.

Sec. 2959. In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, and noneconomic damages shall not be awarded.

Sec. 2960. (1) The person seeking to establish fault under sections 2957 and 2959 has the burden of alleging and proving that fault.

(2) Sections 2957 to 2959 do not create a cause of action.

Sec. 6304. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties,

the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all of the parties and nonparties regarding each claim sa provided in sections 2956 to 2960.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each party and nonparty at fault, including intentional conduct, and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (4) or section 6303, and enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d. Except as otherwise provided in subsection (5), a person shall not be required to pay damages in an amount greater than his or her percentage of fault.

(4) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1488 to the amount of the appropriate limitation set forth in section 1484. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

(5) In an action alleging medical malpractice, 1 of the following applies:

(a) If the plaintiff is determined not to have a percentage of fault under subsections (1) and (2), the liability of defendants that are persons or entities described in section 5838a(1) is joint and several.

(b) If the plaintiff is determined to have a percentage of fault under subsections (1) and (2), upon motion made not later than 6 months after a final judgment is entered, the court, in regard only to parties who are persons or entities described in section 5838a(1), shall determine whether all or part of such a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other of those parties according to their respective percentages of fault as determined under subsection (1). A party is not required to pay a percentage of any uncollectible amount that exceeds that party's percentage of fault as determined under subsection (1). The party whose liability is reallocated continues to be subject to contribution and to any continuing liability to the plaintiff on the judgment.

Sec. 6306. (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:

(a) All past economic damages, less collateral source payment as provided for in section 6303.

(b) All past noneconomic damages.

(c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.

(d) All future medical and other health care costs reduced to gross present cash value.

(e) All future noneconomic damages reduced to gross present cash value.

(f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts.

(2) As used in this section, "gross present cash value" means the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue, as found by the trier of fact as provided in section 6305(1)(b).

(3) If the plaintiff was assigned a percentage of fault under section 6304, the total judgment amount shall be reduced, subject to section 2959, by an amount equal to the percentage of plaintiff's fault. When reducing the judgment amount as provided in this subsection, the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages.

Section 2. Section 2949 of Act No. 236 of the Public Acts of 1961, being *section 600.2949 of the Michigan Compiled Laws*, is repealed.

Section 3. Sections 1621, 1627, 1629, 1641, 2925d, 2945, 6304, and 6306 of Act No. 236 of the Public Acts of 1961, being *sections 600.1621*, *600.1627*, *600.1629*, *600.1641*, *600.2925d*, *600.2945*, *600.2948*, *600.6304*, and *600.6306 of the Michigan Compiled Laws*, as amended by this amendatory act, apply to cases filed on or after the effective date of this amendatory act.

Section 4. This amendatory act shall take effect September 1, 1995.

History

Approved by the Governor on September 29, 1995

Sponsor

Introduced by Reps. Nye, Dalman, Fitzgerald, Bush, Lowe, Ryan, Law, Jersevic and Galloway

End of Document